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Supreme Court, U.S.
FILED

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No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

THE BOEING COMPANY, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

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December 6, 1988

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QUESTIONS PRESENTED

1. Whether the court of appeals misconstrued the clearly erroneous standard of Federal Rule Civil Procedure 52(a) by disregarding testimonial evidence in reversing the trial court's factual findings of Petitioner's intent.

2. Whether the court of appeals improperly presumed as a matter of law that the fact of a severance payment constitutes injury to the government sufficient to support a federal common law tort claim derived from the standards of a criminal conflict of interest statute, 18 U.S.C. § 209.

3. Whether disclosure of the severance payments to government officials and their acquiescence in them negates a common law tort claim predicated on 18 U.S.C. § 209.



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Petitioner the Boeing Company prays that this Court issue a writ of certiorari to the United States Court of Appeals for the Fourth Circuit to review the opinion and judgment of that court in *United States of America v. The Boeing Company, Inc., Melvyn R. Paisley, Thomas K. Jones, Herbert A. Reynolds, Harold Kitson, Jr., and Lawrence H. Crandon*.¹

¹The Boeing Company and the individuals listed above were defendants in the district court and appellees in the court of appeals. The United States was the plaintiff in the district court and the appellant in the court below.

The individual defendants-appellees are filing a separate petition for a writ of certiorari. The Boeing Company incorporates by reference the issues raised and the arguments made by the individual defendants-appellees in their petition.

OPINIONS BELOW

The opinion of the court of appeals is reported at 845 F.2d 476 and is set forth in Appendix A. The opinion of the district court is reported at 653 F. Supp. 1381 and is set forth in Appendix B.

JURISDICTION

The judgment of the court of appeals was entered on May 5, 1988. A timely petition for rehearing with a suggestion of rehearing *en banc* was denied September 7, 1988, and is attached as Appendix C. The Court has jurisdiction to review the decision of the court of appeals under 28 U.S.C. § 1254(1).

STATUTORY PROVISION

This case, with respect to Boeing, is a federal common law tort action predicated on the standard of a criminal statute, 18 U.S.C. § 209. Section 209, which is set forth in full at Appendix D, provides in relevant part:

Whoever receives any salary, or any contribution to or supplementation of salary, as compensation for his services as an officer or employee of the executive branch of the United States Government . . . from any source other than the Government of the United States . . . ; or

Whoever . . . pays, or makes any contribution to, or in any way supplements the salary of, any such officer or employee under circumstances which would make its receipt a violation of this subsection —

Shall be fined not more than \$5,000 or imprisoned not more than one year; or both.

STATEMENT OF THE CASE

Statement of Facts

This case involves a novel attempt by the Department of Justice Civil Division to enforce a criminal statute — under which no charges could be brought — by contriving a tort suit based on severance payments that Boeing made to five of its employees who later entered government service. Although there is general precedent for the government to bring civil actions based on criminal convictions, the government has never brought criminal charges for the granting or receipt of severance payments, under 18 U.S.C. § 209 or any other statute. The Criminal Division of the Department of Justice, after investigation, declined to prosecute this matter. Nor has the government ever previously brought a civil suit under 18 U.S.C. § 209 or any other theory challenging the granting of severance payments.

Novelty in government litigation may be laudable where the application of ingenuity is necessary to reach some otherwise unreachable evil. That is hardly the case here. Through this case the Department of Justice has decided to outlaw the common practice of severance payments, notwithstanding a government regulation that recognizes the practice.² That the Justice Department's decision conflicts with the policies of the Defense Department is underscored by the fact that the Secretary of Navy, Undersecretary of Defense for Research and Engineering, Deputy Undersecretary of Defense for Policy and the Director of Command and Control, Space in the Of-

²Section 15-205.39 of the Armed Services Procurement Regulations expressly permits contractors to charge severance payments to their General and Administrative overhead costs in accordance with the terms of the regulation.

fice of the Chief of Naval Operations all testified for defendants in this case.³

The five severance payments at issue were made pursuant to a longstanding Boeing practice well known to the government.⁴ Its purpose was twofold: (1) to sever all employment

³Secretary of Navy John F. Lehman testified at trial and provided a declaration that is part of the record. Undersecretary of Defense Richard D. DeLaur provided a declaration that is part of the record, but he was excused as a witness on the day of trial. Deputy Undersecretary of Defense General Richard G. Stilwell and Admiral Robert E. Kirksey, Director of Command and Control, Space, provided declarations that are part of the record. J.A. 402, 415, 426, 436.

⁴At the beginning of the Reagan administration, the government recruited aerospace experts from Boeing and other members of the industry to fill various positions relating to the national defense. Between May 1981 and July 1982, five Boeing employees — T.K. Jones, Melvyn R. Paisley, Herbert A. Reynolds, Lawrence H. Crandon, and Harold Kitson, Jr. — retired or resigned from Boeing to enter federal service at the urging of high level representatives of the government. To sever all ties and compensate for lost benefits, Boeing made a severance payment to each of these five employees prior to the termination of his employment relationship with Boeing and before he commenced work for the government:

(1) T.K. Jones became the Deputy Under Secretary of Defense for Strategic and Theater Nuclear Forces on June 1, 1981. He was recruited for this position by the Under Secretary of Defense for Research and Engineering. On the day of his resignation from Boeing, May 19, 1981, he received a severance payment of \$132,000.

(2) Melvyn R. Paisley was recruited for government service by the Secretary of the Navy to become Assistant Secretary of the Navy for Research, Engineering and Systems. When Mr. Paisley retired from Boeing on October 1, 1981, he received a severance payment of \$183,000.

(3) Herbert A. Reynolds became Deputy Director of Space and Intelligence Policy on October 4, 1981. When Mr. Reynolds resigned from Boeing on July 22, 1981, he received a severance payment of \$80,000.

(4) Harold Kitson, Jr. retired from Boeing on July 31, 1982 to accept a position as Deputy Assistant Secretary of the Navy

and financial ties between Boeing and the employee to avoid any potential for a conflict of interest; and (2) to encourage public service by decreasing the financial penalties incurred by employees who left the employ of Boeing to enter public service. As John Lehman, then Secretary of the Navy and the superior of two of the individual defendants, testified at trial, severance payments help enable individuals to leave a private company to enter public service by releasing the "golden handcuffs" of the company, that is, the "financial incentives that are designed to prevent [middle management] from leaving the company." Joint Appendix ("J.A.") 1073. Over the past twenty years, Boeing made twenty-one severance payments to employees who left the Company to enter public service.

Boeing's practice of making severance payments was no secret to the government. Over the past two decades, Boeing consulted with the general counsels of the recruiting agencies on at least three occasions to ensure that the appropriate government officials were aware of, and did not object to, the Company's practice. App. B, 18a. Moreover, Boeing routinely charged severance payments, including the five payments at issue here, to its General and Administrative overhead account pursuant to Armed Services Procurement Regulations that explicitly govern the cost allowability of employee severance payments. Like all of Boeing's overhead costs, these payments were routinely audited by the Defense Contract Audit Agen-

for Command, Control, Communications and Intelligence. He received a severance payment of \$50,000 on the date of his retirement.

(5) Lawrence H. Crandon was requested by Assistant Deputy Under Secretary of Defense for Communications, Command and Control to join the NATO Air Command and Control System team in Brussels, Belgium, as a computer scientist and communications, command and control engineer. Mr. Crandon resigned from Boeing on March 5, 1982, and received a severance payment of \$40,000.

cy ("DCAA") in setting the Company's overhead rates. Finally, with respect to the payments at issue here, the individual defendants disclosed the fact and amount of payment in Financial Disclosure Reports filed with the government.⁵ Mr. Paisley and Mr. Jones personally discussed the propriety of the severance payments and the manner of their disclosure with attorneys from the Office of the General Counsel of the Department of Defense and the Navy. They were advised to aggregate all forms of earned and non-investment income received from Boeing, including the severance payments, on their disclosure forms in accordance with the government's instructions for completing the forms. J.A. 1037, 1062-1063.

The ultimate decision to make a severance payment was made at the highest levels of corporate management by Mr. T.A. Wilson, the Chairman and Chief Executive Officer or, in his absence, by the President of the Boeing Company. Mr. Wilson personally approved four of the five payments at issue here. The Industrial Relations staff of the operating division in which the individual was employed prepared a preliminary recommendation for an appropriate severance payment which was based on various factors, including the difference in salary and benefits between Boeing and government employment. Mr. Wilson approved or adjusted the recommended amount based on his sense of the employee's past contributions to the Company. He was "not aware of the specific calculation method followed by the Industrial Relations Staff, and approved

⁵Pursuant to the Ethics in Government Act, Messrs. Jones, Paisley, Reynolds, and Kitson each submitted a required "Form SF-278 Financial Disclosure Report" to the appropriate Defense Department "Designated Agency Ethics Official". J.A. 116-148. Mr. Crandon, who was hired as a GS-15 level employee, was not required to complete an SF-278 Financial Disclosure Report. J.A. 298, ¶ 259; 338, ¶ 91. The government's express instructions for completing the SF-278 Financial Disclosure Forms required the reporting employee to aggregate all forms of earned and non-investment income received from a single source. 32 C.F.R. § 40.10(b).

severance payments to the individual defendants based on [his] determination that the proposed payment was reasonable and fair to the departing employee." App. B, 20a.

In performing its routine audit function in late 1981, the DCAA questioned the allowability of the five severance payments at issue and subsequently reported them to the Department of Defense contracting officer. The matter was referred to the Department of Justice on July 14, 1982. In 1985 upon threat of immediate suit, Boeing executed an agreement that tolled the statute of limitations as of March 25, 1985, but expressly preserved the defense if, as the district court found, the statute had run prior to that date. App. B, 24a.

On July 22, 1986, the government filed a civil action against Boeing and its five former employees alleging common law violations of the standard of conduct set forth in the criminal conflict of interest statute, 18 U.S.C. § 209. No direct charges for violating that statute were brought. The government's claim against Boeing is for money damages based on an alleged common law tort of violating a standard of conduct derived from § 209. The government claimed that Boeing induced a breach of fiduciary duty by a government employee through Boeing's act of making severance payments to its employees upon their termination of employment. App. B, 24a. The government's claim against the individuals, by contrast, is based on a quasi-contract theory for breach of the duty of loyalty owed by the individuals to the government. App. B, 24a. The government concedes and has stipulated that no actual conflict of interest occurred, but claims that the payments created an appearance of a conflict of interest.

Decisions Below

In a bench trial, the United States District Court for the Eastern District of Virginia granted judgment for the defendants on all issues. The district court's ruling was based on thirty-six findings of fact and eight conclusions of law made after hearing the testimony of four witnesses and evaluating the depositions of ten witnesses.⁶ The following findings of fact and conclusions of law were key:

(1) Intent is required under § 209 and based on the testimony of witnesses and other evidence, the severance payments were not intended by Boeing as a supplementation of the individuals' government salaries or as compensation for their government services;

(2) the severance payments were not contingent upon the individuals entering government service, the position assumed in government, their remaining in government for any length of time, or their returning to Boeing;

(3) the severance payments were timely disclosed to the government and therefore did not violate common law agency principles which prohibit only secret profits;

(4) the severance payments created neither the appearance of nor an actual conflict of interest because none of the individuals were in a position to — nor in fact did — render preferential treatment to Boeing; and

(5) the government's claims against Boeing for the

⁶The district court heard testimony from John F. Lehman, Secretary of the Navy, Melvyn Paisley, T.K. Jones and James N. Heyel; and had before it the depositions of Charles P. Hagberg, H.K. Hebel, T.A. Wilson, S.M. Little, Jr., Mark K. Miller, T.K. Jones, Melvyn Paisley, Harold Kitson, Jr., Lawrence H. Crandon; as well as the deposition of the United States. App. A, 13a, n.1.

first four severance payments were barred by the applicable three year statute of limitations, 28 U.S.C. § 2415(b).

App. B, 19a, 20a, 21a, 26a, 27a, 28a, 29a.

On appeal, the United States Court of Appeals for the Fourth Circuit, in a divided decision, affirmed in part and reversed in part. The Fourth Circuit held that although § 209 requires intent, the district court's finding that Boeing did not intend the payments as compensation for the individuals' government service was clearly erroneous. App. A, 8a. Noting that the district court's finding was "based largely on statements by the individual defendants and others at Boeing," the court nevertheless reversed that finding based on "[o]ther evidence in the record" App. A, 8a. This "other evidence" was derived from a limited number of factual circumstances surrounding the payments, including the factors used in calculating the preliminary recommendations for the severance payment. App. A, 8a.

The court also reversed the district court's holding that the government had suffered no injury because the severance payments created neither the appearance of nor an actual conflict of interest. App. A, 9a. According to the majority, the severance payments created the appearance of a conflict which was deemed sufficient injury for the government to recover. App. A, 8a, 9a.

The court also held that the individuals' disclosure of the payments did not negate the government's injury because "a violation of the standards of § 209 . . . is not limited to secret compensation." App. A, 9a. The court alternatively held that even if secrecy or nondisclosure is an element of § 209, the disclosures made by the individuals were insufficient. App. A, 9a.

Finally, the court of appeals affirmed the district court's holding that the government's claims for four of the five sever-

ance payments were barred by the applicable statute of limitations, 28 U.S.C. § 2415(b). App. A, 11a.

Judge Hall concurred in the majority's opinion regarding statute of limitations issues, but dissented from the majority's reversal of the district court's factual finding that the severance payments were not intended as compensation for government service. App. A, 13a. The dissent stated that the issue of intent is "a factual determination purely within the province of the district court" and that the district court reached its finding "after hearing substantial testimony and weighing the credibility of numerous witnesses." App. A, 13a. In Judge Hall's view, the district court's finding on Boeing's intent could not be clearly erroneous because it was supported by substantial testimony the credibility of which was weighed by the trial court. App. A, 13a, 14a.

Judge Hall concluded that the majority confused the distinction between severance payments that are in addition to — and therefore, semantically, a supplement to — salary earned by a departing employee with payments that are intended to compensate for government service. Only the latter are proscribed by 18 U.S.C. § 209. App. A, 14a. Judge Hall further noted, in citing to the district court's findings, that although prospective factors were used in calculating the amount of the severance payments, the person at Boeing who made the ultimate decision regarding the payments was not aware of the specific formula used and approved the final severance payments based on his assessment of what was reasonable and fair to the departing employee. App. A, 14a.

Following the court's decision, the Fourth Circuit denied petitions for rehearing and suggestions for rehearing *en banc*, by a six to five vote, with Judges Russell, Widener, Hall, Chapman and Wilkins dissenting. App. C, 30a, 31a.

REASONS FOR GRANTING THE WRIT

In this case the Fourth Circuit is demonstrably wrong on the legal issues of the standard of appellate review, the construction of 18 U.S.C. § 209 and the elements of a common law tort claim involving an alleged conflict of interest. These errors of law are compounded by the policy implications of the lower court's ruling. As Judge Hall observed in dissent, "in enacting § 209(a), Congress recognized that a balance must be struck in order to encourage private industry's best minds to enter the public sector. By its holding today, this Court has tipped the balance and advanced a much more restrictive policy than Congress ever intended." App. A, 15a.

This is a case of first impression based on civil violations of standards of conduct derived from a criminal statute, 18 U.S.C. § 209. The court of appeals correctly held that intent was a requisite element of § 209, but effectively eliminated the intent requirement by its flawed construction of both the clearly erroneous standard of Fed. R. Civ. P. 52(a) and the type of intent required under § 209. The court of appeals' construction of Rule 52(a) clearly conflicts with decisions of other courts of appeals as well as this Court's recent decision in *Anderson v. Bessemer City*, 470 U.S. 564 (1985), and therefore, warrants review by this Court.

In addition, although this is a case of first impression as a tort suit under § 209, the decision below conflicts with decisions of other courts of appeals that set forth the requirements of civil actions predicated on violations of statutory standards contained in other conflict of interest statutes. By presuming injury from the mere fact of the severance payments, the court of appeals misconstrued the basic tort principles that apply in these types of cases. The court of appeals made a similar error in its holding that the common law of agency has no ap-

plication to this case. Under the majority's flawed analysis, all severance payments run the risk of violating the standards of § 209, regardless of whether they are disclosed to the government or whether they create a conflict of interest.

Because the standards that govern civil actions premised on the conflict of interest statutes raise important and recurring issues of federal law that have yet to be addressed by this Court, the writ should be granted.

I. The Fourth Circuit Misconstrued the Clearly Erroneous Standard and Effectively Eliminated the Intent Requirement of § 209 by Reversing the District Court's Finding that Boeing Lacked Compensatory Intent.

In its decision below, the court of appeals rejected the government's argument that § 209 sets forth an objective standard of conduct that does not require intent and held that the statute indeed requires that payments be intended "as compensation for" government service. App. A, 7a. However, the majority held that the district court's finding that Boeing did not intend the severance payments as compensation for government service was clearly erroneous. App. A, 8a.

The court of appeals concluded that the district court's finding "was based largely on statements by the individual defendants and others at Boeing," but reversed based on inferences drawn from "other evidence in the record." App. A, 8a. This "other evidence" consists of the court of appeal's analysis of a limited number of factual circumstances surrounding the severance payments at issue and Boeing's severance pay practice generally. The court of appeals found that: (a) "the payments were calculated in large part based on the financial impact of moving from Boeing to the government"; (2) "Boeing's stated purpose in making the payments was to encourage

public service by lessening the financial penalties involved in accepting government employment"; (3) Boeing had "the parallel practice of providing paid leave for state and local service"; and (4) "in twenty-five years only twenty-one such payments were made, and only to those entering high level government service." The court of appeals stated that "[v]iewing all of the evidence, we find that the five payments here were made with compensatory intent, and that the trial court's finding of no such intent was clearly erroneous." App. A, 8a-9a. This analysis, by its own terms, constitutes a reweighing of evidence contrary to the requirements of Rule 52(a) as set forth by this Court in *Anderson v. Bessemer City*, 470 U.S. 564 (1985).

In applying Rule 52(a), an appellate court may not duplicate the role of the trial court by deciding factual issues *de novo*: "[I]f the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." 470 U.S. at 574-75. These restrictions apply even when the trial court's findings are based on documentary evidence rather than the credibility of witnesses. However, when findings are based largely on credibility determinations, "Rule 52(a) demands even greater deference to the trial court's findings." *Id.* at 575-76.

In its decision below, the court of appeals clearly exceeded its authority under Rule 52 by engaging in a *de novo* review of the evidence and substituting its judgment for that of the district court. As Judge Hall pointed out in his dissent, "[i]ntent is a factual determination purely within the province of the district court." App. A, 13a. Here, the district court relied on testimonial evidence of Boeing witnesses, the individual defendants and Defense Department officials in its finding that

Boeing lacked compensatory intent. The majority dismissed this evidence without discussion despite the deference that Rule 52 requires it be given on review, choosing instead to rely on questionable inferences it has drawn from other evidence. The majority's failure to consider this testimony not only disregards the district court's evaluation of its credibility, but potentially establishes a rule of law that eliminates consideration of subjective intent or other issues that necessarily turn on testimonial evidence.

Moreover, the majority selectively disregarded other factual circumstances that specifically negate the inferences that it drew from the "other evidence." The record shows and the district court found that "[t]he severance payments made to the individual defendants were not contingent upon the individuals entering into federal government, their remaining in government service for any stated period of time, or their returning to Boeing at any time in the future. Once the individual separated from the Company, the severance payment was his unconditionally, no matter what he did in the future." App. B, 19a. Moreover, the record shows and the district court found that both Boeing and the individuals timely disclosed the fact of the severance payments to the government. App. B, 21a, 22a, 27a. This evidence clearly undercuts the "other evidence" of intent relied upon by the majority and shows that the majority's reversal was based on its own reweighing of selective parts of the record.

The majority's reversal not only reflects a misconstruction of Rule 52(a), but also of § 209. The majority concluded that the severance payments were made with the intent needed to violate § 209 because the factual circumstances surrounding the severance payments "suggests" that Boeing intended "to supplement the federal salaries" of its former employees. App. A, 8a. This conclusion is simply wrong.

Any severance payment can be characterized as a "supplement" to future income of an individual because it is necessarily available to be spent at some future time. The court of appeals, however, appears to have inferred intent from the fact of payment, thus overlooking the statute's requirement that there be an intent to compensate for government services. This unwarranted inference is tantamount to an irrebuttable presumption that all severance payments constitute compensation for government services. As Judge Hall observed, "the majority fail[ed] to articulate a distinction between payments intended as compensation and those which are not." App. A, 14a.

II. The Fourth Circuit Erred in Presuming Injury from the Mere Fact of the Severance Payments.

The court of appeals also reversed the district court's finding that the government had not been injured, and therefore could not recover damages. The district court found that the severance "payments created neither the appearance of nor an actual conflict of interest." App. B, 27a. Contrary to the district court finding, the majority concluded that the severance payments created the appearance of a conflict which it deemed sufficient injury to recover in tort. App. A, 9a. In effect, the court of appeals presumed injury from the fact of payment.

The majority's reversal reflects a misunderstanding of the principles of a federal common law tort. The government's case against Boeing is not a criminal action brought pursuant to § 209. It is a tort action for inducing a breach of duty under standards derived from § 209. As such, the case must be governed by common law tort principles. See, e.g., *Continental Management, Inc. v. United States*, 527 F.2d 613 (Ct. Cl. 1975).

It is axiomatic that a plaintiff cannot recover in tort unless it can establish injury. In tort cases brought pursuant to conflict of interest statutes, courts have presumed injury only when the conduct at issue was inherently contrary to the duties and obligations of the employee, such as acceptance of a bribe, acquisition of an economic interest that is adverse to the government's interest, or abusing one's government position to obtain a personal benefit. *See, e.g., Continental Management*, 527 F.2d at 618; *United States v. Kearns*, 595 F.2d 729, 733 (D.C. Cir. 1978). In these cases, there was a factual predicate for injury to the United States. A bribe, for example, is a payment to exact action that, by its nature, is in conflict with the duties and obligations of a government employee. Not so with a severance payment. In a bribery case injury may be presumed because "the probability that damage will flow from the [conduct]" is irrefutably high. *Continental Management*, 527 F.2d at 618. Even where injury is presumed, however, the defendant can overcome the presumption by proving that the government in fact suffered no harm. *Id.* at 619 n.6.

Here the majority presumed injury from the mere fact of payments made to sever relations *prior* to government employment: "The appearance of large payments by a defense contractor to key Defense Department employees is enough [to establish injury]." App. A, 9a. Such a presumption is improper because the payments were in respect of and to sever the employment relationship prior to government employment, and because the severance payments did not create an inherent conflict as would a bribe which "[o]bviously no one would give or offer [the payment] unless he expected to gain some advantage thereby." " *Continental Management*, 527 F.2d at 618, *quoting Kemler v. United States*, 133 F.2d 235, 238 (1st Cir. 1942). The majority's presumption of injury in this case is logically flawed because it leaps from the fact of a severance payment to the conclusion of a conflict of interest and, in so

doing, fails to distinguish between severance payments that violate § 209 and those that do not.

Moreover, the government agreed the payments did not create an actual conflict of interest and so stipulated. Under these circumstances, the court of appeals' presumption of injury effectively causes all severance payments to run afoul of § 209. This result was not intended by the court of appeals itself and, as Judge Hall observed in dissent, was not intended by Congress in enacting § 209. App. A, 7a, 15a.

III. The Fourth Circuit Erroneously Disregarded the Law of Agency in Holding that Secrecy or Nondisclosure is Not an Element of a Civil Action Predicated on Section 209.

The court of appeals' analysis of the effect of disclosure of the payments is also flawed. The court of appeals rejected the application of the common law principle of agency that disclosure cures a potential conflict of interest and that a principal may recover only secret or undisclosed profits from its agent. The court held that an action "based on a violation of the standards of § 209 . . . is not limited to secret compensation." App. A, 9a. This holding is contrary to the holding in virtually every civil case decided under the conflict of interest statutes.

Tort actions brought pursuant to these criminal statutes necessarily incorporate common law principles of agency because they are based on an agent's breach of fiduciary duty or a third party's inducement of a breach. *See, e.g., United States v. Mississippi Valley Generating Co.*, 364 U.S. 520 (1961); *Continental Management*, 527 F.2d at 617 & n. 3. Under agency standards, an agent's receipt of payments constitutes a breach of duty to the principal only if it is unknown to the principal. *See, e.g., United States v. Carter*, 217 U.S.

286, 306 (1910); *United States v. Kenealy*, 646 F.2d 699, 704 (1st Cir.), *cert. denied*, 454 U.S. 941 (1981); *Continental Management*, 527 F.2d at 617; *United States v. Drisko*, 303 F. Supp. 858, 860 (E.D. Va. 1969). The rationale underlying this rule is sound: "an agent's receipt of *secret* profits injures the principal because it necessarily creates a conflict of interest and tends to subvert the agent's loyalty" *Continental Management*, 527 F.2d at 617 (emphasis added).

By rejecting the application of agency principles in this case, the court of appeals has in effect created a new federal cause of action which deviates from existing precedent governing civil actions predicated on the conflict of interest statutes. This result not only challenges the integrity of this precedent; it adds additional confusion to an area of law that demands clarity.

This aspect of the decision, moreover, will have a chilling effect on all severance payments if private employers may still incur liability for payments that are fully disclosed to the government. Such a result, as Judge Hall observed in dissent, is clearly contrary to the intent of Congress which, in enacting § 209, "recognized that a balance must be struck in order to encourage private industry's best minds to enter the public sector." App. A, 15a.

CONCLUSION

For the reasons stated, this court should grant the petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit.

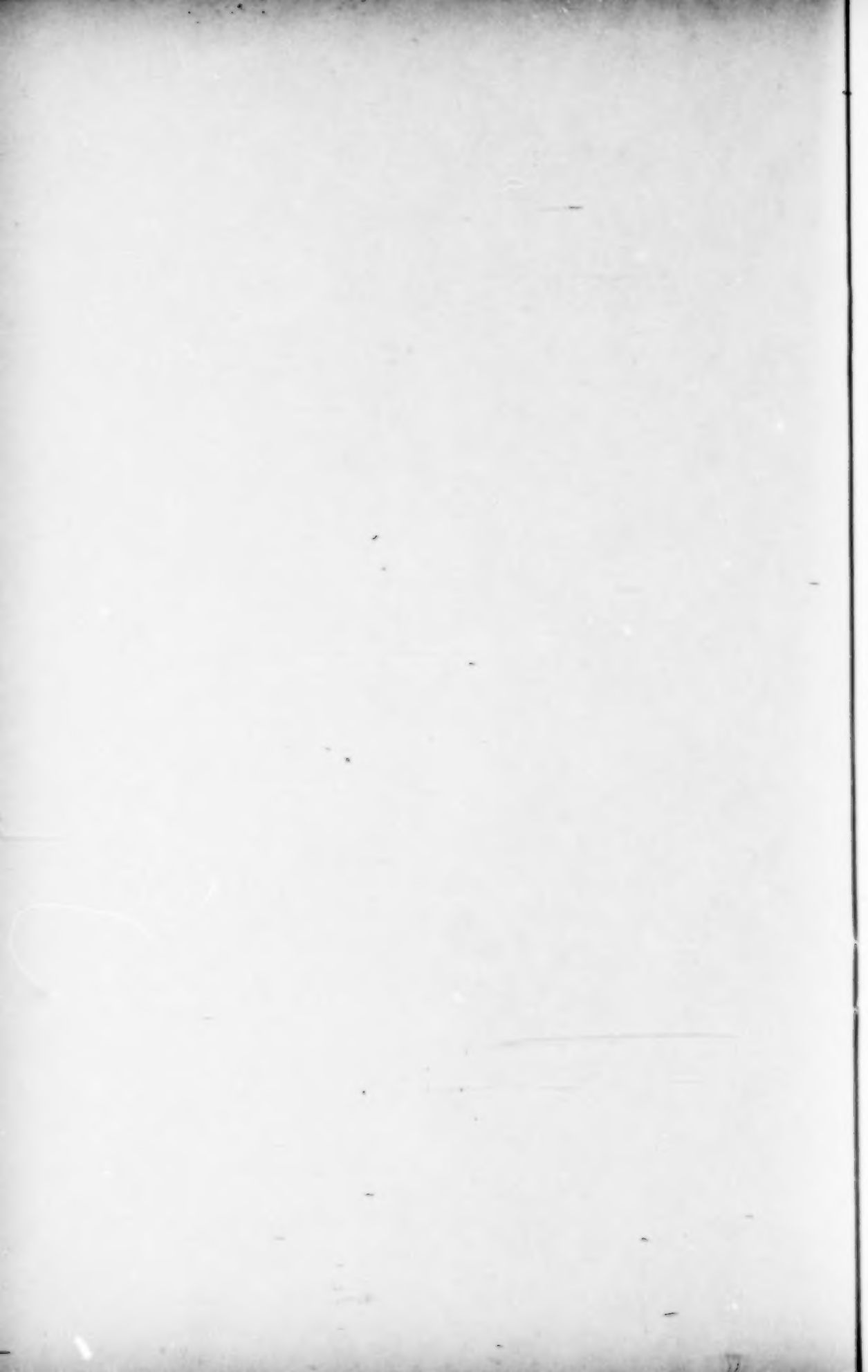
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December 6, 1988



APPENDIX A

DECISION

845 F.2d 476 -

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 87-2054

United States of America,

Plaintiff-Appellant,

versus

The Boeing Company, Inc.; Melvyn R.
Paisley; Thomas K. Jones; Herbert Reynolds;
Harold J. Kitson; Lawrence H. Crandon,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern
District of Virginia, at Alexandria. Claude M. Hilton, District
Judge. (C/A 86-0829-A).

Argued: December 3, 1987

Decided: May 5, 1988

Before HALL and ERVIN, Circuit Judges, and BUTZNER,
Senior Circuit Judge.

Michael F. Hertz, Civil Division, Department of Justice
(Richard K. Willard, Assistant Attorney General; Henry E.
Hudson, United States Attorney; Joan E. Hartman, Civil Divi-

sion, Department of Justice on brief) for Appellant; Philip Allen Lacovara (Roger P. Fendrich; Andrew T. Karron; Hughes, Hubbard & Reed on brief); Robert S. Bennett (Alan Kriegel; Dunnells, Duvall, Bennett & Porter; Benjamin S. Sharp; Hilary Harp; Perkins Coie; Gerard F. Treanor, Jr.; Amy S. Berman; Venable, Baetjer & Howard on brief) for Appellees.

ERVIN, Circuit Judge:

In 1981 and 1982, five Boeing Company ("Boeing") employees left the company to assume high-level positions in the Reagan administration. Before their federal employment began, Boeing made a large "severance payment" to each one with the payments totalling \$485,000. In 1986, the government instituted this civil action to recover the amount of the payments from both Boeing and the individual employees based on 18 U.S.C. § 209(a),¹ a conflict of interest statute. At trial, the district court found for defendants. *United States v. Boeing Co.*, 653 F. Supp. 1381 (E.D. Va. 1987). The government appeals. We affirm in part and reverse in part.

¹§ 209. Salary of Government officials and employees payable only by United States

(a) Whoever receives any salary, or any contribution to or supplementation of salary, as compensation for his services as an officer or employee of the executive branch of the United States Government, or any independent agency of the United States, or of the District of Columbia, from any source other than the Government of the United States, except as may be contributed out of the treasury of any State, county, or municipality; or

Whoever, whether an individual, partnership, association, corporation, or other organization pays, or makes any contribution to, or in any way supplements the salary of, any such officer or employee under circumstances which would make its receipt a violation of this subsection —

Shall be fined not more than \$5,000 or imprisoned not more than one year, or both.

I. The Facts

During 1981 and 1982, the federal government recruited the five individual defendants for positions in the Department of Defense (DOD) or NATO. Boeing encouraged the men to accept the positions and gave each a significant severance payment upon his termination from Boeing. The details of the payment are as follows.

(1) Thomas K. Jones became Deputy Under Secretary of Defense for Strategic and Theater Nuclear Forces on June 1, 1981. He received \$132,000 from Boeing on May 19, 1981.

(2) Herbert A. Reynolds became a Defense Department consultant on July 26, 1981, and Deputy Director of Space and Intelligence Policy on October 4, 1981. He received \$80,000 from Boeing on July 22, 1981.

(3) Melvyn R. Paisley became Assistant Secretary of the Navy for Research, Engineering and Systems on December 2, 1981. He received \$183,000 from Boeing on October 1, 1981.

(4) Lawrence H. Crandon became a computer scientist for the NATO Air Command and Control Systems Team on March 8, 1982. He received \$40,000 from Boeing on March 5, 1982.

(5) Harold Kitson became a Defense Department consultant on August 2, 1982, and Deputy Assistant Secretary of the Navy for Command, Communications and Control Intelligence in September, 1982. He received \$50,000 from Boeing on July 31, 1982.

While T.A. Wilson, Boeing's chairman and chief executive officer, determined the actual amount of each payment, lower level employees and the departing employees made preliminary calculations based on the financial impact of moving from Boe-

ing to the government. Calculation factors included salary and benefit differentials, higher living costs, moving expenses, and the expected length of government service. A separate payment not at issue here cashed out the employees' interests in existing benefits. Boeing made a total of twenty-one such severance payments between 1962 and 1982 to encourage government service and sever all financial ties between Boeing and the departing employees. Employees entering government service at the state and local levels were allowed to go on paid leave instead of resigning.

The existence and the amount of the payments were disclosed initially in Financial Disclosure Reports filed by each individual. In late 1981, employees of the Defense Contract Audit Agency (DCAA) became aware of the nature of the payments. Boeing sought to include the payments in overhead calculations, in effect charging the government for them. Later, Boeing agreed not to include them in overhead. On March 22, 1982, the DCAA notified the DOD contracting officer for Boeing of the payments and their nature. The matter was referred to the Justice Department on July 14, 1982. After an unexplained delay of nearly three years, the Justice Department and Boeing executed an agreement tolling the statute of limitations on March 25, 1985. The government filed this action on July 22, 1986.

In a bench trial, the district court found for the defendants reasoning that: (1) severance payments made prior to government employment do not violate the standards of § 209; (2) subjective intent is required to violate § 209, and no intent was shown; (3) because the payments were disclosed, they did not violate common law agency principles which prohibit only secret, undisclosed profits; (4) the payments created neither the appearance of nor an actual conflict of interest; and (5) the three year statute of limitations, 28 U.S.C.

§ 2415(b), bars the claims against Boeing for the first four payments.

The issues on appeal are whether § 209 applies to severance payments made prior to government service, whether § 209 includes an intent element, whether § 209 includes an injury element, and the statute of limitations.

II. 18 U.S.C. § 209

This is a case of first impression in which the government seeks to apply the standards of § 209 in a civil action to recover severance payments made before five individuals began their government employment. Section 209(a) provides, in relevant part:

Whoever receives any salary, or any contribution to or supplementation of salary, as compensation for his services as an officer or employee of the executive branch of the United States Government . . . from any source other than the Government of the United States . . .; or

Whoever . . . pays, or makes any contribution to, or in any way supplements the salary of, any such officer or employee under circumstances which would make its receipt a violation of this subsection —

Shall be fined not more than \$5,000 or imprisoned not more than one year, or both.

Although the conflict of interest statutes, including § 209, are criminal in nature, civil remedies exist based on the fiduciary duty owed by federal employees. *See United States v. Kenealy*, 646 F.2d 699, 703 (1st Cir.), *cert. denied*, 454 U.S. 941 (1981); *United States v. Kearns*, 595 U.S. 729, 733 (D.C. Cir. 1978); *Continental Management, Inc. v. United States*, 527 F.2d 613, 617 (Ct. Cl. 1975). That duty is defined by the

statutory standard of conduct. *Kenealy*, 646 F.2d at 703; *Continental Management*, 527 F.2d at 617, 620. Therefore, the government has a civil cause of action based on the statutory standards of § 209.

A. Preemployment Severance Payments

Section 209 prohibits outside "contribution to or supplementation of salary, as compensation for his services as an officer or employee" of the United States. On its face, this does not require that payment occur while the party was a government employee. The district court, however, read § 209 to require payment during government employment. *Boeing*, 653 F. Supp. at 1386; *see also United States v. Raborn*, 575 F.2d 688 (9th Cir. 1978) (in dicta, stating that status as an employee is an element of a violation of § 209). Because the statutory language is ambiguous, we turn to the legislative history of § 209.

Prior to 1962, § 209 was codified at 18 U.S.C. § 1914, and provided "[w]hoever, being a Government official or employee, receives any salary in connection with his services" In 1962, Congress eliminated the phrase "being a Government official or employee," a phrase which did require employment status at the time of payment. This change indicates that payment need not occur during federal employment; a preemployment payment to supplement salary could also violate § 209.

The policy behind § 209 and the conflict of interest laws in general also support a broad interpretation of its coverage. The statutes are

directed at an evil which endangers the very fabric of a democratic society, for a democracy is effective only if the people have faith in those who govern,

and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption. The seriousness of this evil quite naturally led Congress to adopt a statute whose breadth would be sufficient to cope with the evil.

United States v. Mississippi Valley Generating Co., 364 U.S. 520, 562 (1961). Congress has established rigid rules of conduct to ensure that this faith is maintained. *Id.* at 551; *Kenealy*, 646, F.2d at 703; *Continental Management*, 527 F.2d at 620. Large severance payments by defense contractors to those going to work at high levels in the Defense Department certainly "arouse suspicions," and those suspicions are not reduced by making the payments just before government service begins.

Therefore, we conclude that payments made prior to the onset of federal service can violate § 209. Employment status at the time of payment is not an element of a violation. All preemployment payments do not necessarily run afoul of § 209, so we must still determine whether these payments were made to supplement salaries "as compensation for . . . services as an officer or employee of the United States."

B. Intent

The government argues that the conflict of interest statutes, including § 209, set forth an objective standard of conduct which does not include an intent requirement. This ignores the language of § 209, that payments must be made "as compensation for" services as a government employee. The district court found that neither Boeing nor the individual defendants intended the payments to be compensation for their government services.

The court's finding was based largely on statements by the individual defendants and others at Boeing that the payments were not made with that intent. Other evidence in the record contradicts these statements. First, the payments were calculated in large part based on the financial impact of moving from Boeing to the government. The individual defendants and other Boeing employees calculated salary, benefits and cost-of-living differences over the expected term of government employment. The chairman, who decided the ultimate amount, received a recommendation and was aware of the factors used to reach that figure. Second, Boeing's stated purpose in making the payments was to encourage public service by lessening the financial penalties involved in accepting government employment. These financial penalties include lower salary and benefits, so that payments were advance supplements to ease the pain of transition. Third, the parallel practice of providing paid leave for state and local service suggests that payments to federal employees were designed to do the same thing without technically violating § 209. Finally, the fact that in twenty-five years only twenty-one such payments were made, and only to those entering high level government service similarly suggests an intent to supplement the federal salaries of a limited number of employees. Viewing all of the evidence, we find that the five payments here were made with compensatory intent, and that the trial court's finding of no such intent was clearly erroneous.

C. Injury

The defendants vigorously argue that the government was not injured by the payments because there was neither the appearance of nor an actual conflict of interest. Testimony as to their exemplary work records and the absence of complaints within DOD was offered to prove that no injury occurred. This

ignores the preventive nature of the conflict of interest laws, that the appearance of conflicts rather than actual conflicts or corruption is all that is necessary. See *Mississippi Valley*, 364 U.S. at 549, 561-62; *Kearns*, 595 F.2d at 734; *Continental Management*, 527 F.2d at 618. The appearance of large payments by a defense contractor to key Defense Department employees is enough; there is no need to show an actual conflict, much less actual corruption. The knowledge and approval of superiors does not alleviate the situation. *Mississippi Valley*, 364 U.S. at 561.

Similarly, the defendants argue that their disclosure of the payments negates any injury because under the common law, only secret profits present a conflict. See *Kenealy*, 646 F.2d at 704-05; *Kearns*, 595 F.2d at 734. This action, however, is based on a violation of the standards of § 209, which is not limited to secret compensation. Even if secrecy or nondisclosure was an element here, effective disclosure must be formal, complete, and directed to the proper parties. *Kenealy*, 646 F.2d at 705. Here, the disclosures were statements of total income from Boeing, combining salary and the severance payments in one figure, reported on financial disclosure forms. Blanket disclosures that fail to differentiate ordinary and extraordinary payments are not sufficiently complete to insulate the payments from the conflict of interest laws.

To summarize, we hold that payments made to future federal employees before they begin government service can violate § 209, if they are made with compensatory intent. Injury in the form of corruption or an actual conflict of interest is not required; the appearance of a conflict is sufficient to violate § 209. Specifically, we find the severance payments by Boeing to the individual defendants were made with the intent to compensate for government service and created the appearance of a conflict of interest. Therefore, they violated

§ 209, and, absent other considerations, the government is entitled to recover the amount of the payments from either Boeing or the individuals.

III. The Statute of Limitations

A. Boeing

The claim against Boeing is based in tort for the inducement of a breach of duty by the individual defendants and for making payments in violation of § 209. A three year statute of limitations applies under 28 U.S.C. § 2415(b).² Boeing executed an agreement tolling the limitations period on March 25, 1985. Therefore, the critical date is three years before that date, March 25, 1982, and the inquiry becomes did the cause of action against Boeing accrue before that date.

The cause of action accrued at the time the tort was committed, here being the date of payment. Four of the five payments occurred before March 25, 1982. The statute of limitations bars the government's claim for those four payments absent something tolling the limitations period. That something, argues the government, is 28 U.S.C. § 2416(c),³

²28 U.S.C. § 2415(b) provides, in relevant part:

Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon a tort shall be barred unless the complaint is filed within three years after the right of action first accrues . . .

³§ 2416. Time for commencing actions brought by the United States — Exclusions. For the purpose of computing the limitations periods established in section 2415, there shall be excluded all periods during which —

* * *

(c) facts material to the right of action are not known and reasonably could not be known by an official of the United States charged with the responsibility to act in the circumstances:

which excludes from the limitations period any period during which the material facts are not and reasonably could not have been known by a government official charged with the responsibility to act.

That official, according to the Justice Department, was the DOD contracting officer for Boeing who learned the relevant facts in a memo from the DCAA on March 26, 1982. The government fails to explain, however, why DCAA employees charged with auditing responsibilities were not charged with the responsibility to act here. Conclusory statements that the contracting officer was the first official with the knowledge and ability to recognize a conflict do not justify tolling the statute under § 2416(c) and are refuted by the fact that DCAA employees and managers recognized that a problem existed. The decision to refer that problem to the contracting officer does not diminish their ability to act. Therefore, we find that the statute of limitations was not tolled under § 2416(c), and that four of the five claims against Boeing are time-barred. Only the claim based on the final payment to defendant Kitson on July 31, 1982 falls within the limitations period.

B. The Individual Defendants

The individual defendants were not parties to the tolling agreement of March 25, 1985, so the relevant date for claims against them is July 22, 1986, the date the government filed this action. Clearly, any three year limitations period had expired by then for all five payments. However, violation of § 209 constitutes a breach of the duty of loyalty, and is contractual in nature. *See Jankowitz v. United States*, 533 F.2d 538, 548 (Ct. Cl. 1976); Restatement (Second) of Agency, §§ 401 comment a, 403 comment a. Therefore, the six year

statute of limitations in 28 U.S.C. § 2415(a)⁴ applies. The payments all occurred after July 22, 1980, so none of the claims against the individual defendants is barred.

IV. Conclusion

We hold that the severance payments made by Boeing in this case violated 18 U.S.C. § 209. The government has a civil cause of action for the amount of each payment against both Boeing and the recipient of that payment, although double recovery by the government is not permitted. The three year statute of limitations in 28 U.S.C. 2415(b), however, bars the government's claims against Boeing for four of the five payments; only its claim based on the Kitson payment survives. The claims against the individual defendants are not time barred. Therefore, the decision below is

*AFFIRMED IN PART,
REVERSED AND REMANDED IN PART.*

⁴28 U.S.C. § 2415(a) provides, in relevant part:

(a) Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues or within one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law, whichever is later: . . .

HALL, Circuit Judge, concurring in part and dissenting in part:

I concur in that part of the majority's opinion finding that four of the five claims against Boeing are barred by the applicable three-year statute of limitations, 28 U.S.C. § 2415(b). I also agree that a six-year limitation period applies to the breach of the duty of loyalty claims against the individual defendants. I cannot join that part of the majority's decision, however, finding that the five payments here were made with compensatory intent. In my view, the district court's judgment should be affirmed in all respects.

Section 209(a) provides, in relevant part, that "[w]hoever receives any salary, or any contribution to or supplementation of salary, as compensation for his services . . ." shall be guilty of a misdemeanor. This language clearly contemplates that, for a payment to violate § 209(a), it must both supplement the employee's salary and also be intended as compensation for the employee's services as an officer or employee of the government. It is evident, therefore, that Congress did not intend that payments were to be proscribed by 209(a) if they were made without culpable intent.

In this case, the district court found that these severance payments were not intended, either by Boeing or the employees, as compensation for their government service. Intent is a factual determination purely within the province of the district court. Here, after hearing substantial testimony and weighing the credibility of numerous witnesses,¹ the district court found as a matter of fact that "[t]he severance

¹The district court heard testimony from John F. Lehman, Secretary of the Navy, Melvyn Paisley, T.K. Jones and Harold Kitson, Jr.; and had before it the depositions of Charles P. Hagberg, H.K. Hebler, T.A. Wilson, S.M. Little, Jr., Mark K. Miller, T.K. Jones, Melvyn Paisley, Harold Kitson, Jr., Lawrence H. Crandon; as well as the deposition of the United States.

payments made to the individual defendants were not intended by Boeing as a supplementation of their government salaries or as compensation for their government services." I simply cannot agree with the majority's conclusion that the district court's findings were clearly erroneous.

In reaching its decision, the majority attaches great weight to the fact that Boeing relied in part upon the disparity between what the employees were earning at Boeing and what their anticipated government salaries would be, in calculating the amount of the severance payments. The majority quite correctly found that the severance payments tended to lessen the financial pain experienced by these employees in accepting government service. The majority inexplicably concludes, however, that since these severance payments were supplements, they must have been made with compensatory intent. Thus, the majority fails to articulate a distinction between payments intended as compensation and those which are not. Although the distinction is a fine one, it is clearly a distinction which Congress intended to make in enacting § 209(a).

The severance payments made here were in accordance with a policy followed by Boeing for over twenty years as a matter of good corporate citizenship. As the Secretary of the Navy articulated at trial, the purpose of the payments was to release the employees from their "golden handcuffs," or unvested benefits, as well as sever all financial ties between the employees and the company. Although there is evidence that these severance payments were calculated with the employees' prospective salaries in mind, the district court found that "[t]hose responsible for the ultimate decision were not aware of the specific calculation method," but approved the payments based upon what was determined to be "reasonable and fair to the departing employee[s]."

The majority minimizes the fact that the government, not Boeing, initiated the efforts to recruit these employees for government service. It is also undisputed that, after accepting government employment, these employees neither were in a position to provide, nor did they in fact provide, preferential treatment to Boeing. In sum, in enacting § 209(a), Congress recognized that a balance must be struck in order to encourage private industry's best minds to enter the public sector. By its holding today, this Court has tipped that balance and advanced a much more restrictive policy than Congress ever intended. For the foregoing reasons, I respectfully dissent.

APPENDIX B

BENCH OPINION

653 F. Supp. 1381

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	CIVIL ACTION
v.)	NO. 86-0829-A
)	
THE BOEING COMPANY,)	
MELVYN R. PAISLEY,)	
THOMAS K. JONES,)	
HERBERT A. REYNOLDS,)	
HAROLD KITSON, JR.,)	
AND LAWRENCE H.)	
CRANDON,)	
Defendants.)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of Fact

1. The Boeing Company ("Boeing") is a corporation organized and existing under the laws of the State of Delaware. The corporate headquarters are located at 7755 East Marginal Way South, Seattle, Washington. Boeing maintains an office

and conducts business within the geographical limits of the jurisdiction of this Court.

2. Defendant T.K. Jones ("Jones") is a resident of the State of Washington; Defendant Melvyn Paisley ("Paisley") is a resident of the Commonwealth of Virginia; Defendant Herbert A. Reynolds ("Reynolds") is a resident of the State of Washington; Defendant Harold Kitson, Jr. ("Kitson") is a resident of the State of Washington; Defendant Harold Crandon ("Crandon") is a resident of Brussels, Belgium.

3. Boeing traditionally has encouraged public service by its employees. Some forms of public service, such as service in state or local government, do not require a complete severance of the individual's employment relationship with Boeing. Boeing has made financial arrangements with its employees who accept positions in state and local government, such as paid leave, in an effort to diminish the personal economic incentives associated with public service.

4. Over the past twenty years, the Department of Defense has regularly solicited highly qualified employees from Boeing for government service. The government repeatedly has asked Boeing to assist it in identifying such qualified employees, and has specifically requested that Boeing encourage these employees to accept positions in the Federal government.

5. Boeing has a long-standing practice of making severance payments to individuals who terminate their employment with the Company in order to enter government service. In making these payments, Boeing has endeavored to encourage its employees to serve their government and provided a mechanism to completely sever all financial ties between Boeing and the departing employee.

6. During the period from 1962-1982, Boeing made at least twenty-one severance payments to individuals who terminated

their employment with the Company in order to enter government service.

7. Boeing has repeatedly disclosed to the United States government, including responsible officials of the Department of Defense, the fact of these payments and the circumstances under which they are made. One such disclosure letter specifically noted that severance payments were calculated with reference to the differential between the financial benefits that would accrue to the employee if he remained with Boeing, as compared with those that would accrue to the employee if he accepted the anticipated government position.

8. Despite actual knowledge of Boeing's practice of making severance payments, the government has never objected to the practice, and on at least one occasion informed Boeing that a proposed severance payment was in compliance with the federal conflict of interest statutes.

9. During 1981 and 1982, each of the individual defendants was recruited from Boeing by the federal government for a position within the Department of Defense.

10. On or about May 19, 1981, Jones resigned from Boeing and, on or about June 1, 1981, he assumed the position of Deputy Under Secretary of Defense for Strategic and Theater Nuclear Forces.

11. On or about October 31, 1981, Paisley retired from Boeing. On December 2, 1981, following Senate confirmation, Paisley was sworn in as Assistant Secretary of the Navy for Research, Engineering and Systems. Paisley continues to serve in this position.

12. On or about July 22, 1981, Reynolds resigned from Boeing. On July 26, 1981, he became a consultant to the Defense Department and on October 4, 1981, received an appointment

to the position of Deputy Director of Space and Intelligence Policy.

13. On March 5, 1982, Defendant Crandon resigned from Boeing. On or about March 8, 1982, he was appointed to the position of computer scientist with the North Atlantic Treaty Organization ("NATO") Air Command and Control Systems ("ACCS") Team in Brussels, Belgium. Crandon continues to serve in this position.

14. On August 1, 1982, Kitson retired from Boeing. Kitson served as a consultant to the Department of Defense from August 2, 1982, until September 1982, when he was appointed Deputy Assistant Secretary of the Navy for Command, Communications and Control Intelligence.

15. Boeing made severance payments to the five individual defendants on the following dates: T.K. Jones, May 19, 1981; Herbert R. Reynolds, July 22, 1981; Melvyn R. Paisley, October 1, 1981; Lawrence H. Crandon, March 5, 1982; and Harold Kitson, Jr., July 31, 1982.

16. At the time Boeing made and the individual defendants accepted the severance payments in question, the individuals were still employed by Boeing and had not yet entered into government service.

17. The severance payments made to the individual defendants were not contingent upon the individuals entering into federal government service, the position assumed in the federal government, the agency served in the federal government, their remaining in government service for any stated period of time, or their returning to Boeing at anytime in the future. Once the individual separated from the Company, the severance payment was his unconditionally, no matter what he did in the future.

18. At the time the individual defendants left Boeing, Boeing did not make any commitment to rehire them at any time in the future and the individuals made no commitment to return to Boeing. Although Boeing might have been willing ultimately to reemploy the individuals, it had no expectation that the individuals would return to the Company at the time that they terminated their employment.

19. The severance payments to these individual defendants were not made with the intent that the individuals would give Boeing preferential or other favorable treatment during the term of their government employment, and the payments were not understood by the individuals as such.

20. Staff personnel in the Industrial Relations Department performed calculations to arrive at a proposed severance payment for presentation to individuals within Boeing with final, decision-making authority. Those responsible for the ultimate decision were not aware of the specific calculation method followed by the Industrial Relations Staff, and approved severance payments to the individual defendants based on their determination that the proposed payment was reasonable and fair to the departing employee.

21. Boeing never asked the individual defendants to provide it with any preferential treatment or special advantages during their tenures with the government, and the individuals in fact never provided Boeing with any such preferential treatment or special advantage.

22. The severance payments made to the individual defendants were not intended by Boeing as a supplementation of their government salaries or as compensation for their government services. The individual defendants did not understand the severance payments to be compensation for their services to the government or a supplement to their government salaries.

23. The government supervisors of each of the individual defendants were and are fully satisfied that the individuals capably and honorably performed their public duties without bias and with independence and impartiality and have never engaged in or otherwise participated in a conflict of interest.

24. At no time has the Department of Defense taken any disciplinary or other adverse action against any of the individual defendants, although it has had actual knowledge of their previous employment by Boeing and their receipt of a severance payment from Boeing.

25. The severance payments were understood by the individual defendants to be partial compensation for the loss of benefits which they had earned as a result of their prior service with Boeing. They were informed by Boeing that the payment was a means of avoiding any possible conflict of interest by severing all financial connections with Boeing.

26. Before entering into government service, during the course of routine ethics reviews, Messrs. Jones and Paisley disclosed to attorneys in the Office of the General Counsel of the Department of Defense and the Navy, respectively, of the fact and amount of the severance payments which they received from Boeing. Jones also discussed his receipt of the Boeing severance payment with his government superiors, Under Secretary of Defense Dr. Richard DeLauer, and Dr. DeLauer's Executive Office, Colonel Kenneth Hollander. Jones was assured that he could accept the anticipated severance payment.

27. Messrs. Jones, Reynolds, Kitson and Paisley disqualified themselves from working on any Boeing-related matters as of September 1982. The disqualifications applicable to Messrs. Jones, Reynolds and Kitson remained in effect for the balance of the period of their government service. Mr. Paisley resumed

participation in a Boeing-related project on September 17, 1984, at the express direction of Secretary of the Navy, John Lehman. In his government position, Mr. Crandon has no direct procurement role, does not award contracts and does not make source selection decisions.

28. The amounts of the severance payments to the individual defendants were recorded in the overhead pools on the accounts of BAC. The account in which these payments were recorded is systematically and regularly monitored by auditors of the Defense Contract Audit Agency ("DCAA") of the Department of Defense, resident at the Boeing facility. Payments were recorded on the following dates: Jones, May 21, 1981; Reynolds, July 30, 1981; Paisley, October 8, 1981; Crandon, February 25, 1982; Kitson, July 29, 1982.

29. During the course of such routine monitoring of BAC's overhead costs, DCAA auditors noted the severance payments to Messrs. Jones, Reynolds and Paisley. During the period from November 1981 to January 1982, DCAA auditors requested information from Boeing about these payments. In response, Boeing informed the auditors of the Company's historical practices of making severance payments and the basis for the severance payments to these individuals, including specifically the factors considered in arriving at the payment amount.

30. As a result of this dialogue, as of mid-February 1982, the DCAA Resident Auditor at BAC, the DCAA Branch Manager of the Puget Sound Branch, and Director of the San Francisco Region of DCAA were aware of the following: that severance payments had been made to Messrs. Jones, Reynolds and Paisley; the amount of the payments; the government positions assumed by these individuals following their separation from Boeing; the factors now alleged by the government to have been considered by Boeing in arriving at the amount of the payment; and the method by which Boeing ac-

counted for those payments pursuant to Armed Services Procurement Regulation 15-205.39.

31. Each year the government calculates a percentage of costs included in the overhead pools of contractors that the government anticipates or projects will ultimately be disallowed when the overhead claim is closed. This calculation of anticipated unallowable costs is expressed as a percentage of the total overhead pools, and is called the withhold rates. The government unilaterally establishes these withhold rates. Boeing applies the withhold rate to the overhead dollars to be billed on each contract, and the resultant dollars are withheld from periodic contract payments made by the government to Boeing.

32. The withhold rate is set annually and adjusted periodically during the course of the year at the discretion of the government's Administrative Contracting Officer. The withhold rate is set at a level intended to cover all potential unallowable costs. In the past, the application of the withhold rate has resulted in the government withholding monies in excess of Boeing Aerospace Company's total costs ultimately disallowed in every year.

33. In 1981, during the period in question, \$7.8 million to \$4.4 million was withheld. For 1982, \$4.6 million to \$3.9 million was withheld.

34. Overhead claims of Boeing Aerospace Company for the years 1981 and 1982 have not been finally settled to date. The withhold rates set by the government for those years are more than adequate to cover all costs which may ultimately be disallowed, including the severance payments paid by Boeing during those years. Moreover, even if the withhold rates established for 1981 and 1982 were not sufficient to cover all ultimately disallowed costs for those years, that will not be

known until the overhead claims for those years are finally settled.

35. On March 22, 1985, at the request of the Civil Division of the Department of Justice, Boeing executed an agreement tolling the three-year statute of limitations governing the government's tort claim against Boeing, set forth in 28 U.S.C. § 2145(b). The agreement, which was prospective only, contained an effective date of March 25, 1985.

36. The Plaintiff commenced this action on July 22, 1986.

Conclusions of Law

This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1345, and venue is proper in this Court pursuant to 28 U.S.C. § 1391(b).

The government contends it has a cause of action under the federal common law for breach of fiduciary duty created by 18 U.S.C. § 209 against both the recipients of a salary supplement for government services and against the payer of such a supplement. It also claims a cause of action against the individual defendants for breach of an implied contract. At trial the government elected to proceed against Boeing in tort for breach of fiduciary duty and against the individual defendants for breach of implied contract.

At the time that Boeing made and the individuals accepted the severance payments in question, the individuals had not yet entered into government service and were not employees of the United States government. For this reason, there was no principal-agent relationship between the individual defendants and the United States government at the time that Boeing made, and the individuals accepted, those payments. See *Restatement (Second) of Agency*, § 387 (1958).

Because they were not government employees, the individual defendants owed no fiduciary or other duty to the United States government at the time of the severance payments. *See id.* In accepting those payments, the individuals therefore breached no common law or other duty owed to the United States government, and Boeing did not induce or otherwise participate in any breach of fiduciary duty by the individual defendants.

Even assuming that the individual defendants owed a fiduciary duty to the United States government at the time of the severance payments in question, neither the making, acceptance or retention of those payments constituted or induced in any fashion a breach of that duty.

18 U.S.C. § 209(a) provides . . .

Whoever receives any salary, or any contribution to or supplementation of salary, as compensation for his services as an officer or employee of the Executive Branch of the United States government, of any independent agency of the United States, or the District of Columbia, from any source other than the government of the United States, except as may be contributed out of the treasury of any state, county, or municipality; or

Whoever, whether an individual, partnership, association, corporation, or other organization pays, or makes any contribution to, or in any way supplements the salary of, any such officer or employee under circumstances which would make its receipt a violation of this subsection.

Shall be fined not more than \$5,000 or imprisoned not more than one year, or both.

18 U.S.C. § 209 forbids the supplementation of salary and does not apply to the giving of a severance payment by a private employer to an employee who has not, at the time of receipt, entered into government service. Moreover, the acceptance of a severance payment by a non-government employee does not violate 18 U.S.C. § 209. *See* S. Rep. No. 2213, 87th Cong., 2d Sess. *reprinted in* 1962 Code Cong. & Ad. News 3852, 3863.

Even if 18 U.S.C. § 209 were read to apply to the defendants in this case, the Court concludes that that statutory section was not violated. Based on all the evidence before the Court, including the testimony of the witnesses, the Court finds that the severance payments in question were not made by Boeing with the intention of supplementing the individual defendants' government salaries, nor were they intended as compensation for government services rendered by those individuals. Similarly, the severance payments were not accepted by the individual defendants as a supplementation to their government salaries or as compensation for their government services. The government contends that the use of salary loss as a method of computation necessarily has a prospective effect which equates to a salary supplementation. This ignores the fact that the use of salary figures and benefits are an accurate measure of past contributions to the company. Salaries are paid on the basis of length of service and level of performance. In any event the formula for calculation of severance pay cannot make the payment something other than severance pay. The payments made by Boeing were severance payments made to sever the relationship with these employees based on past performance and accumulated benefits. The payments therefore were not contrary to the standards of conduct established by Section 209. *See United States v. Muntain*, 610 F.2d 964 (D.C. Cir. 1969).

The defendants cannot be said to have violated the Department of Defense regulations codified in 32 C.F.R. Part 40 (1980). Those regulations by their express terms apply only to employees of the Department of Defense. Because the individual defendants were not employees of the United States government at the time they accepted the payments, they were not bound by those regulations, and their conduct was not prohibited by the regulations. For this reason, the Court concludes that severance payments, as made here, did not violate these regulations.

The defendants also did not violate standards of conduct established by common law principles of agency. In accordance with those principles, an agent may be held liable to his/her principal for receipt of undisclosed, secret profits which create a conflict of interest. See *Continental Management, Inc. v. United States*, 527 F.2d 613 (Ct. Cl. 1978). The severance payments here at issue were timely disclosed to responsible agents of the United States government. The payments were not in the nature of "secret profits," and could not in any fashion tend to subvert the loyalty of the individual defendants to the United States government. See also *United States v. Carter*, 217 U.S. 286 (1910); *United States v. Kenealy*, 646 F.2d 699 (1st Cir.), *cert. denied*, 454 U.S. 941 (1981); *United States v. Kearns*, 595 F.2d 729 (D.C. Cir. 1978).

These payments created neither the appearance of nor an actual conflict of interest. None of the individual defendants were in a position in the government to provide preferential treatment to Boeing and in fact none of the individual defendants rendered preferential treatment to Boeing while a government employee. Under these circumstances, neither the making nor the acceptance of the severance payments could be said to have created an actual or a potential conflict of

interest, or a corresponding breach of the employees' duty of undivided loyalty.

The government was not injured by the making or acceptance of these payments. The severance payments were not made with the intent to secure preferential treatment for Boeing. The individuals never rendered preferential or other favorable treatment to Boeing during their respective periods of government service. Under these circumstances, the government cannot be said to have been injured by the challenged conduct. Having in fact suffered no harm, the government is not entitled to recover damages.¹ See *Continental Management, Inc. v. United States*, 527 F.2d at 619 n.6.

Moreover, the government is not entitled to recover interest on the amount of the severance payments for the period of time during which they were recorded by Boeing as an overhead cost. At the government's direction, Boeing has withheld from the amount of overhead costs billed to the government on government contracts an amount which is sufficient to cover the amount of the challenged payments. The government therefore has not paid to Boeing an amount representing these payments. Again, having suffered no injury, the government is not entitled to recover the damages which it here claims. Moreover, inasmuch as Boeing's overhead rates for 1981 and 1982 have not been finally negotiated, this claim by the government is not ripe, and would be justifiable, if at all, only before the Board of Contract Appeals or Claims Court.

The defendant, Boeing, also raises as a defense the statute of limitations. The Court finds that the government's claims as to the first four of the questioned severance payments are

¹In any event, the government would not be entitled to recover damages twice — once from Boeing, and once again from the individual defendants. See *Continental Management, Inc. v. United States*, 527 F.2d at 619.

barred by 28 U.S.C. § 2415(b). For purposes of computing the running of this statute of limitations period, the government's cause of action is deemed to have accrued on the date on which the severance payments were made. *See, e.g., United States v. Central Soya, Inc.*, 697 F.2d 165 (7th Cir. 1982); *United States v. Limbs*, 524 F.2d 799 (9th Cir. 1975); *Dameron v. Washington Magazine, Inc.*, 575 F. Supp. 1578 (S.D.N.Y. 1983).

The severance payments to Messrs. Jones, Reynolds, Paisley and Crandon were each made more than three years prior to the March 25, 1985 effective date of the statute of limitations tolling agreement executed by Boeing on March 22, 1985. The government actually knew, or with the exercise of reasonable diligence could have known, all the facts underlying its cause of action as to the payments to Messrs. Jones, Reynolds, Paisley and Crandon, more than three years prior to March 25, 1985. Accordingly, the government's claim for damages against Boeing as to these individuals arising from these payments is time barred.

For reasons set forth above, judgment on all counts will be entered for the defendants.

An appropriate order shall issue.

/s/ Claude M. Hilton

UNITED STATES DISTRICT JUDGE

Alexandria, Virginia
Date: Feb. 17, 1987

APPENDIX C
DENIAL OF PETITION FOR REHEARING
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 87-2054

United States of America,

Plaintiff-Appellant,

v.

The Boeing Company, et al.

Defendants-Appellees.

On Petitions for Rehearing with Suggestions
for Rehearing In Banc

The appellees' petitions for rehearing and suggestions for rehearing in banc were submitted to this Court. In a requested poll of the Court, Judges Russell, Widener, Hall, Chapman, and Wilkins voted to rehear the case in banc; and Judges Winter, Phillips, Murnaghan, Sprouse, Ervin, and Wilkinson voted to deny rehearing in banc.

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petitions for rehearing and suggestions for rehearing in banc are denied.

Entered at the direction of Judge Ervin, with the concurrence of Judge Butzner. Judge Hall dissents.

For the Court

JOHN M. GREACEN

CLERK

APPENDIX D

CHAPTER 11 — BRIBERY, GRAFT, AND CONFLICTS OF INTEREST

§ 209. Salary of Government officials and employees payable only by United States

(a) Whoever receives any salary, or any contribution to or supplementation of salary, as compensation for his services as an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia, from any source other than the Government of the United States, except as may be contributed out of the treasury of any State, county, or municipality; or

Whoever, whether an individual, partnership, association, corporation, or other organization pays, or makes any contribution to, or in any way supplements the salary of, any such officer or employee under circumstances which would make its receipt a violation of this subsection —

Shall be fined not more than \$5,000 or imprisoned not more than one year, or both.

(b) Nothing herein prevents an officer or employee of the executive branch of the United States Government, or of any independent agency of the United States, or of the District of Columbia, from continuing to participate in a bona fide pension, retirement, group life, health or accident insurance, profit-sharing, stock bonus, or other employee welfare or benefit plan maintained by a former employer.

(c) This section does not apply to a special Government employee or to an officer or employee of the Government

serving without compensation, whether or not he is a special Government employee, or to any person paying, contributing to, or supplementing his salary as such.

(d) This section does not prohibit payment or acceptance of contributions, awards, or other expenses under the terms of the Government Employees Training Act (Public Law 85-507, 72 Stat. 327; 5 U.S.C. 2301-2319, July 7, 1958).

(e) This section does not prohibit the payment of actual relocation expenses incident to participation, or the acceptance of same by a participant in an executive exchange or fellowship program in an executive agency: *Provided*, That such program has been established by statute or Executive order of the President, offers appointments not to exceed three hundred and sixty-five days, and permits no extensions in excess of ninety additional days or, in the case of participants in overseas assignments, in excess of three hundred and sixty-five days.

(f) This section does not prohibit acceptance or receipt, by any officer or employee injured during the commission of an offense described in section 351 or 1751 of this title, of contributions or payments from an organization which is described in section 501(c)(3) of the Internal Revenue Code of 1954 and which is exempt from taxation under section 501(a) of such Code.